INDEX

TABLE OF CASES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition in this matter should be denied both upon the merits and the questions of law involved. Since petitioner has seen fit to present the questions of law before the merits of this case, your respondent is following the same procedure for the Court's convenience.

1. THE POLICY WAS A NEW JERSEY CONTRACT.

Both the District Court and the Circuit Court of Appeals concluded that the policy in suit was a New Jersey contract. There was ample basis for this finding. As the Circuit Court has well pointed out, the policy contained the following provision:—

> . . . "but this policy shall not be valid until countersigned by a duly authorized Agent of the Company at 58-14 Collingswood, N. J."

As the Circuit Court stated in its opinion now reported in 155 Fed. 2nd 988, 990:—

> "Plaintiff based its right of recovery squarely upon the written insurance contract which it incorporated into its statement of claim. This was reiterated in plaintiff's opening to the Trial Court. The policy was put into evidence in the plaintiff's case. At no time was there the slightest suggestion of any waiver of the mandatory counter-signature provision above quoted. There was no claim by either party that the policy was void because not actually countersigned at Collingswood. . . . The provision calling for the countersignature must be construed to mean countersigned at Collingswood. This being so, plainly the policy was intended by the parties to be a New Jersey contract. The last thing to be done, without which there was no agreement, was the New Jersey counter-

signature. It is on that specific agreement that the suit is founded."

Perhaps more pertinent, petitioner has failed to cite one instance where the law of Pennsylvania is in anywise in conflict with the law of New Jersey on the issues here involved. We have found none. In fact, the cases of both States seem to be in complete accord.

2. THE POLICY WAS VOID.

The policy in suit contains the following provision:—

> "This entire policy shall be void, . . . if the interest of the insured be other than unconditional and sole ownership; . . . or if any change other than by the death of insured, take place in *the interest, title or possession* of the subject of insurance . . ." (emphasis supplied)

The uncontradicted facts establish that petitioner had entered into an agreement of sale approximately one month before the alleged loss. The Circuit Court said in its opinion (page 991):—

> "Appellee (respondent here) urges that under the above quoted language the policy was void on the date of the alleged loss. We think this is sound doctrine under the New Jersey decisions. In *Grunauer v. Westchester Insurance Company*, 72 N.J.L. 289 (Ct. E. & A.) a fire insurance policy was held void because prior to the fire the insured had executed a formal contract to sell the insured premises to a third party. That case was followed in *Levin v. State Assurance Co.*, 105 N.J.L. 422 (Ct. E. & A.) 144 A. 797."

The identical rule is followed in Pennsylvania and is specifically sustained in the case upon which petitioner relies namely, *Glessner v. Neshannock Mutual Fire Insurance Company*, 331 Pa. 439 (1 A. 2nd 233). In that case

the Supreme Court of Pennsylvania at page 444 cites, with approval, the case of *Levin v. State Assurance Company*, 105 N.J.L. 422 upon which the Circuit Court based its decision in this case.

It is true that in both the *Glessner* and *Levin* cases, possession had changed. However, this fact was not controlling. As stated by the Circuit Court in the case at Bar (page 991):—

> "As seen, the element of possession which was in the Levin decision was absent here. Possession, however, is merely one feature of ownership and even without it the Levin opinion must be held to establish the New Jersey rule against the Appellant (petitioner here)."

The same rule is expressed by the Pennsylvania Supreme Court in the *Glessner* case.

The condition of the policy in suit by its express terms includes any change—

> ". . . in the interest, title *or* possession." (emphasis supplied)

3. THERE WAS NO LOSS.

On February 2, 1942, approximately one month before the alleged loss, petitioner entered into an agreement to sell its Brigantine property, including the pier, which was the subject of this suit, for the sum of $70,000. On March 10, 1942, approximately one week after the alleged loss, petitioner completed settlement for the property and received the full sale price of $70,000. Petitioner and its purchaser had stricken out of their agreement of sale the provision (Paragraph Eighth thereof) to the effect that the insurance upon the property should be continued for the benefit of the purchaser. Clearly, therefore, the purchaser had no interest in the insurance and has no interest in the present law suit. Just as clearly, petitioner suffered

no loss whatever by reason of the alleged damage to its pier. The present law suit was an afterthought and is merely an attempt by petitioner to get something for nothing.

The Supreme Court of Pennsylvania in *Spratt v. Greenfield*, 279 Pa. 437 (124 A. 126) ruled directly on this question as follows (page 438) :—

> "The general rule is that the purchaser must bear any loss occasioned to the property incurring after the execution of the contract and before delivery of the deed because, unless provided to the contrary, the purchaser to all intents and purposes becomes the owner of the land; the vendor retaining title merely as trustee to secure the payment of the unpaid purchase money."

The policy in suit was a contract of indemnity and unless a loss is shown, there is no right of recovery. *Weightman v. Union Trust Company*, 208 Pa. 449 (57 A. 879).

4. PETITIONER FAILED TO PROVE DAMAGE BY WINDSTORM.

The Trial Court found specifically (Findings of Fact No. 10) that there was no evidence that the damage or any part of it was caused solely and directly by the wind. This was the basic issue upon which petitioner's right of recovery rested. The policy specifically provided that it insured the premises "against all direct loss or damage by windstorm." Plaintiff, therefore, had the burden of proving that the damage to the pier was caused by a windstorm. Plaintiff called only three witnesses whose testimony may be summarized as follows:

Samuel Deitch testified that he was the officer in charge of the United States Weather Bureau at Atlantic City, New Jersey, and that their office records indicated that a storm occurred on March 2 and 3, 1942. He characterized

it as "moderately severe." He had no personal recollection of the particular storm and he knew nothing concerning any damage to petitioner's pier. He stated that he did have a personal recollection of other storms about the same period which he recalled because of their unusual severity.

Harold J. Barker testified that he was a contractor who did bulkhead and pier work at Brigantine Beach. On or about March 10 or 11, 1942, *at the request of the new owner* he made an inspection of the pier for the purpose of estimating the cost of repairing it to make it safe for use. The principal repairs which he found necessary were new pilings. He stated that these were required because the existing pilings were old and were rotted and worm eaten and needed to be replaced. He stated that the front end of the pier (approximately 30 feet) had disappeared. In answer to a direct question, he gave as his opinion that the front end of the pier had been washed away by the action of the waves. This witness knew nothing of any damage caused to the pier by windstorm.

Harry Fried testified that he was the President of the plaintiff corporation and gave his opinion as to the value of the pier. This witness likewise knew nothing of any damage to the pier by windstorm.

This was the sum total of petitioner's evidence. It will be noted that it fails completely to establish that any damage was caused by a windstorm. The only damage mentioned was to the pilings and to the tip of the pier, both of which were exposed to the action of the sea. There is no evidence that even a shingle was blown off the building erected on the pier or that any other structure in the vicinity was in anywise damaged.

Assuming, as petitioner argues, that a *prima facie* case showing damage by windstorm was made out, nevertheless, as the District Court found specifically (Findings of Fact No. 9)

> "The loss and damage to the pier was caused by high water driven by wind."

a loss expressly excluded by the terms of the policy. The plaintiff's own evidence fully supports this finding.

5. CONCLUSION.

For the reasons above discussed, the petition should be denied.

Respectfully submitted,

JOSEPH S. CONWELL,
JOSEPH S. CONWELL, JR.,
Attorneys for Respondent-Appellee.